No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
REYNOLD H. COLVIN,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

This is an appeal from a judgment and order made by the United States District Court for the Southern Division of the Northern District of California, sentencing appellant on an information containing one count, following appellant's conviction on the same, to serve a term of six months in the county jail.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the trial Court by Title 28 U. S. C. A., Section 41(2), and upon this Court by Title 28 U. S. C. A., Section 225.

APPELLANT'S ASSIGNMENT OF ERRORS.

The defendant, T. A. Small, in the above entitled action, has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore given, made and entered against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California and files this, his assignment of errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

I.

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in this case.

II.

That the Court erred in refusing to grant the defendant's motion for arrest of judgment.

III.

That the Court erred in refusing to grant the defendant's motion for a new trial.

FACTS OF THE CASE.

F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed

the matter with the appellant who was the business manager of the Bartenders' Union. The appellant stated that he would see what he could do to procure some whiskey for the latter. The appellant returned and said that he could get ahold of 100 cases of a whiskey known as Baltimore Club Special Reserve at a price of $46.00 per case. Larkin then contacted two other tavernkeepers, Mrs. Bertolucci and Mrs. Baer, and agreed to take this whiskey. According to the witness, Larkin, he paid $780.00, Mrs. Bertolucci paid $185.00 and Mrs. Baer gave a third check to make a total amount of $1975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's warehouse. The amount paid down represented $19.75 per case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse but did not receive the whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he had heard there was something illegal in the transaction and wanted nothing further to do with it, and he returned to Larkin the money that he had been paid. (Tr. pp. 19-21.)

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Company, was called as a witness for the United States. She testified that Rollandelli & Company had purchased a number of cases of Baltimore Club Special Reserve whiskey from the Gordon-O'Neill Company, Inc., Distillery at $20.40 per case,

f.o.b.; that the ceiling price of this whiskey was $26.60 or $27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company some time in November and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination that she did not know Mr. Small, the appellant here, and had never seen him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin and he was not a customer of the company and she had never heard of him. (Tr. pp. 16-18.)

George Moncharsh, Chief Enforcement Attorney for the Office of Price Administration in this district, testified that he had a conversation with Mr. Small, the appellant, around the middle of November, 1943, at his office in San Francisco; that he discussed with Mr. Small the matter of the sale of Baltimore Club Special Reserve whiskey to Mr. Larkin. Mr. Small said that he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders' Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell, that was part of his job. (Tr. pp. 25-26.)

Mr. Moncharsh further said: "Mr. Small, didn't you know the ceiling was $27.00 at the time you made this sale?" Appellant replied: "I knew it was somewhere around there but I didn't know exactly." Moncharsh said: "Well, Mr. Small, the main point is that you are sitting here discussing with me, not the main thing, the motive you had in mind to supply the bartenders with whiskey, but the problem of the sale of whiskey over the ceiling." Appellant replied: "I understand that." Moncharsh asked him: "Who else did you sell this whiskey to?" Appellant replied: "I wouldn't care to say." (Tr. pp. 26-27.)

Moncharsh further testified that he asked him if he knew why the whiskey was not delivered—"when I say 'delivered' I mean delivered to Larkin". He said: "Yes, I know. I know there was a legal proceeding in San Francisco and as a result of those legal proceedings the whiskey at Rollandelli's had got tied up and I couldn't get it to deliver it." Moncharsh further testified: "A little time was spent with my asking what connection he had with Rollandelli. He said that, of course, he knew that the whiskey he was selling was the Baltimore Club Special Reserve at Rollandelli's, that he was selling this whiskey of Rollandelli's to Larkin." (Tr. p. 27.)

Moncharsh further testified: "He said to me, 'Well, what would happen if I were to give you the names of these people with whom I had the arrangements and the names of the other peoples to whom I have sold?' " (Tr. pp. 27-28.)

Clyde O. Bird, an Investigator for the Office of Price Administration, testified that he had a conversation with the appellant at the Office of Price Administration offices. Bird testified: "The conversation took place about two weeks ago. He came to my office and we were discussing this sale of Baltimore Club whiskey. I asked him to tell me in his own words his part of the transaction of the sale of Baltimore Club whiskey. He said that an arrangement was that he was to sell it for $46.50 per case and that he was to get $1.75 per case for his commission for selling it. He sold 100 cases to Mr. Larkin and that he sold 300 cases to other people whose names he would not tell me without consent of his counsel."

Bird continued: "I asked him how he came to make arrangements for the sale of the whiskey and general questions that might bring out his part in the transaction. He told me that he made arrangements to sell it for $46.50 per case; that he sold this 100 cases here and about 300 cases more; that he collected approximately $19.50 per case, which he turned over to other parties involved in the transaction and that the ceiling price of $27.00 per case was to be paid to the distributor, Rollandelli; that he knew it was illegal; he was the secretary of the Bartenders' Union, was connected with the Bartenders' Union, and that he was very much interested in seeing that all of his members were employed and that he was primarily interested in getting liquor for them, although he did tell me on a number of occasions in the presence of Mr. Fineberg that he was to get $1.75

per case for his commission personally to himself. Well, he refused to tell me the names of the other people to whom he sold approximately 300 cases without permission of his attorney." (Tr. pp. 31-32.)

ARGUMENT.

I.

THE PROOF OF AN ATTEMPT TO SELL THE LIQUOR CHARGED IN THE INFORMATION PROPERLY SUPPORTED THE VERDICT OF GUILTY.

The information in this case charged in substance that the defendant "* * * did wilfully and unlawfully sell to one F. W. Larkin, certain distilled spirits * * * at a price of $46.50 per case, which said price * * * was in excess of and higher than the maximum price established by law, to-wit, $27.00 per case for each case * * * as the said defendant then and there well knew."

The Court instructed the jury in part as follows:

> "I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or a contract to sell goods which the seller was unable to carry out.
>
> "In all criminal cases the defendant may be found guilty of an offense the commission of

which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged, if such attempt be itself a separate offense.

* * * * * * *

"Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him."

Therefore, whether proof of an attempt to sell supported the verdict is at an issue in this case.

The Statutes of the United States provide directly for this situation:

Title 18 U. S. C. A., Section 565.

"§ 565. *Verdicts; less offense then charged.* In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense." (R. S. § 1035.)

The attempt to sell in violation of the maximum price control regulations promulgated under the

Emergency Price Control Act is itself a separate offense. Title 50 U. S. C. A. App., Section 904 (a), provides:

> "It shall be unlawful, regardless of any contract agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to pay or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of any regulation or order under section 2 (section 902 of this appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this appendix), or of any regulation, order or requirement under section 202(b) or section 205(f) (section 922(b) or 925(f) of this appendix), or to offer, solicit, *attempt,* or agree to do any of the foregoing." (Italics ours.)

The rule that the proof of an attempt will uphold a conviction under the indictment where the attempt to commit the crime is itself an offense has been recognized in this Circuit. See

Sekinoff v. United States (C.C.A. 9), 283 Fed. 38.

The appellant cites two cases in support of his argument that the lower Court's application of Title 18 U. S. C. A. Section 565, R. S. 1035, requires a reversal of the judgment in this case. The first of these cases is *St. Clair v. United States,* 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936, in which the defendant had been convicted of murder, instructions to the jury on the lesser

degrees of homicide having been refused. The Court cited Section 1035, and noted at 154 U. S. 154:

> "It is, therefore, contended that, as the verdict was, generally 'guilty', and did not, in terms indicate of what particular offense the accused was found guilty, the judgment should have been arrested.
>
> "This contention cannot be sustained. We said in *Pointer's case* that, while the record of a criminal case must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted together, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. 151 U. S. 396, 419."

Thus the judgment was affirmed. The *St. Clair* case in this context stands for only one proposition: That 18 U. S. C. A. Section 565, R. S. 1035, will not be applied to invalidate a judgment where that judgment is clear upon the entire record.

The other case cited by the appellant is *United States v. Martini,* 42 Fed. Supp. 502, at 510, 511. The *Martini* case holds that:

> "Section 565 authorizing the verdict of guilty of a lesser offense contemplates that the verdict must be by the finder of fact to which the question of guilt is submitted. This means in this case the jury. Where the jury finds a defendant guilty of one offense it is not within the power of the court after setting aside the verdict to find the defendant guilty of a lesser offense."

In the case before this Court, the question of the attempt was submitted to the finder of fact, the jury. It was the jury, instructed to consider the question of attempt alone, that decided Small's guilt.

The appellant Small is not prejudiced in this matter with reference to the term imposed; the statutory maximum penalty prescribed for an attempt to sell under 50 *U. S. C. A.* App., Sections 904(a), 925(b), is the same as that set forth for a violation of an illegal sale itself.

Nor is the appellant Small prejudiced in this matter by the possibility of a later prosecution. Assuming, as the appellant desires, that the judgment on its face is a judgment of conviction on the charge of the unlawful sale, prosecution could not be had for that offense. Neither could the appellant be later prosecuted on the charge of an unlawful attempt to violate the Emergency Price Control Act. In the first place, a reading of the entire record in the matter clearly indicates what took place before the trial Court. Secondly, a judgment on an information or an indictment is a bar to subsequent prosecution for any offense which could have been proved under that information or indictment.

Miller v. United States, 300 Fed. 529, cert. den. 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474;

United States v. Olmstead (C.C.A. 9), 5 Fed. (2d) 712.

The record in this case thus amply protects the appellant from a second jeopardy.

The situation here at issue is squarely within the plain meaning and forthright language of the statute. Appellant contends that there is a disparity between the proof of an attempt to sell and the verdict of guilty as to the charge of selling itself. Obviously, no such statute as Title 18 U. S. C. A., Section 565 would be necessary where the information itself charges the defendant with an attempt. If the statute is not applicable to the reconciliation of this inconsistency between pleading and proof then it is mere legalistic foppery and legislative superfluity.

II.

THE DEFENDANT WAS ENGAGED IN THE BUSINESS OF BUYING AND SELLING DISTILLED SPIRITS.

The evidence clearly shows that the defendant offered to sell, supply, and to transfer to Larkin 100 cases of whiskey for which the defendant received payment from Larkin. However, the whiskey was not delivered to Larkin and the moneys received by the defendant were returned to Larkin. In addition to this offer is the uncontroverted testimony that the appellant was selling this whiskey for $46.50 a case and that he was to get $1.75 a case for his pay—commission—for selling it. The appellant had sold approximately 300 cases to other people. This evidence establishes that the appellant, T. A. Small, was engaged in the business of buying and selling whiskey.

Unfortunately, there is much confusion in the cases interpreting the language, "engaged in the business of" and "doing business". This confusion can be readily ascertained by a reading of the 38 page chapter on Business in Volume 12 of *Corpus Juris Secundum,* commencing at page 761. Most of the cases cited in the article deal with taxation matters and a determination of when a person is engaged in business for tax purposes, a class of cases hardly applicable to the situation which now confronts this Court. However, the definition apparently most quoted in the cases appears to be that of the Supreme Court in the case of *Flint v. Stone Tracy Company,* 220 U. S. 107, 171, wherein the Court said:

> "It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing People v. Commissioner of Taxes, 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. I, p. 273."

See also:

Daggett v. Burnet, 65 Fed. (2d) 191, 193.

This definition of course does not present a yardstick by which we can accurately measure a person's activities and thereby determine whether or not he is engaged in a particular business. "The decision in

each instance must depend upon the particular facts before the Court."

Von Baumbach v. Sargent Land Co., 242 U. S. 503, 516.

Did the contract to sell 100 cases to Larkin and the facts surrounding the same, and the admitted sale of (or offer to sell) 300 cases *to other people* occupy the time, attention and labor of Small for the purpose of profit? We submit that it did. He was to receive a profit of $1.75 per case and he was rendering these services not for pleasure or as an isolated transaction, with no business purpose, but as "mercantile transactions". (*Webster's New International Dictionary, Second Edition.*) If the transaction occupied his time for purposes of profit it matters not that his primary occupation was that of a labor representative of the Bartenders' Union.

Likewise, the fact that no sales may ever have been completed is immaterial since many business ventures end in a loss or are terminated for various reasons before they have hardly started. Here apparently, an injunction (and subsequent arrest of the appellant) terminated the business transactions of the appellant before he could complete the same. If the motive was a profit motive, and time and attention were expended to promote the same, such time and attention make the giver thereof a person engaged in business.

CONCLUSION.

It is respectfully submitted that the evidence is sufficient to sustain the verdict of guilty, that appellant has shown no error and that the judgment should be affirmed.

Dated, San Francisco, California,
December 19, 1945.

Respectfuly submitted,

FRANK J. HENNESSY,
United States Attorney,

REYNOLD H. COLVIN,
Assistant United States Attorney,

Attorneys for Appellee.

(Supplement Follows.)

Supplement

Supplement

Maximum Price Regulation 445; 8 F. R. 11161—pertinent sections:

Section 5.4. *Maximum Prices for Wholesalers.*

"(b) *Initial maximum prices*—(1) *For sales to retailers.* A wholesaler's initial maximum price per case to retailers shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item since March 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, except from another wholesaler, multiplied by the percentage mark-up for the item being priced as follows:

(i) 1.15 for distilled spirits.

(ii) 1.25 for wine.

(iii) 1.20 for cordials, liqueurs and specialties."

Section 5.3. *Determination of "net cost" used in figuring maximum prices for wholesalers, retailers and monopoly states.*

"(b) *Elements of net cost.* The net cost to be used by a wholesaler, retailer or monopoly state to determine a maximum price is the total of the following elements of cost actually paid by him with respect to a particular base purchase of the item to be priced:

"(1) *Purchase price.* The supplier's selling price (not in excess of his maximum price under

applicable regulations or orders of the Office of Price Administration).

"(i) Excepting any discount for prompt payment (cash discount); but

"(ii) Including any amount subtracted from the supplier's maximum price to compensate for discontinuance of a discount for prompt payment.

"(2) *Freight.* Transportation charges from the supplier's point of shipment to the wholesaler's, retailer's, or monopoly state's customary receiving point for the item, at the rate paid. No amount shall be included for

"(i) Any transportation charges from point of shipment included in the supplier's selling price; or

"(ii) Expense of hauling, drayage or handling within the metropolitan area of the shipping or receiving point: *Provided,* That a monopoly state may include such portion of that expense as it customarily included during March 1942 in determining cost for purposes of mark-up.

"(3) *Taxes and United States customs duties—*

(i) *For wholesalers and retailers.* United States customs duties and United States state and local excise taxes at rates in effect on November 2, 1942, if not included in the supplier's selling price.

"(ii) *For monopoly states.* United States customs duties and United States excise taxes at rates in effect on March 31, 1942, if not included in the supplier's selling price, and any state taxes at rates in effect on March 31, 1942, customarily included during March 1942 in determining cost for applying mark-up.

"Note: License, income, franchise, receipts, sales, use or other similar Federal, state or local taxes cannot be included in the net cost of a wholesaler, retailer or monopoly state."

Section 7.12. *Definitions.*

"(b) *Definitions of persons to whom this Regulation refers.*

* * * * * * *

"(3) 'Wholesaler' means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers."